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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

REGENTS OF THE UNIVERSITY OF MICHIGAN,
Petitioner,

v.

SCOTT E. EWING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE AMERICAN FEDERATION OF TEACHERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE AMERICAN FEDERATION OF TEACHERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

This brief, *amici curiae*, is jointly filed by the National Education Association (NEA) and the American Federation of Teachers (AFT) with the consent of the parties, pursuant to Rule 36.2 of the Court.

STATEMENT OF INTEREST

The National Education Association and the American Federation of Teachers are nationwide employee organizations with a combined membership of over 2.25 million members, the vast majority of whom are employed in public educational institutions. One of the principal purposes of the NEA and the AFT is to pro-

tect the constitutional and statutory rights of teachers, professors and other educational employees, including their right to be free from arbitrary and capricious governmental action.

Because the Court is being asked to decide issues of importance to the effective vindication of individuals' constitutional rights and the effective protection of constitutional property interests, amici have a substantial interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, brought pursuant to 42 U.S.C. § 1983, presents the question whether a state university's decision to dismiss a student who possesses a property interest in continued enrollment is subject to review under the Due Process Clause to determine whether the state's decision is arbitrary and capricious.

There is no question that respondent Ewing has a property interest in continued enrollment in the University of Michigan Medical School. The District Court and the Court of Appeals both so held, relying on the nature of the relationship under Michigan law between a duly admitted student and a university. As the Sixth Circuit explained, the Michigan Supreme Court has held that "when one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom. . . . There is no good reason why the law should not recognize, as growing out of [the] relations [between students and a university], a right . . . resting in contract to be continued as students . . . ." *Booker* v. *Grand Rapids Medical College*, 156 Mich. 95, 99-100, 120 N.W. 589 (1909), *quoted in* Pet. App. 31a.[1]

[1] Accord, *Maitland* v. *Wayne State University Medical School*, 76 Mich. App. 631, 257 N.W.2d 195 (1977); *cf. Dietz* v. *American Dental Association*, 479 F. Supp. 554 (E.D. Mich. 1979) (applying Michigan law to review substantively the certification decision of a professional association).

This Court has ruled that property interests are created by just such "implied contracts," *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976), and "mutually explicit understandings," *Perry* v. *Sindermann*, 408 U.S. 593, 601-02 (1972). See *Jago* v. *Van Curen*, 454 U.S 14, 17-18 (1981); *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Indeed, we do not understand petitioner to have questioned the existence of Ewing's property interest in continued enrollment in the courts below, see J.A. 21, or to have presented that question for this Court's review, see Pet. for Cert. at 20 & n.20. In any event, as this Court has previously ruled, the concurrent readings of a district court and a court of appeals as to the existence of a property interest are "sufficient to foreclose [this Court's] independent examination of the state-law issue." *Bishop* v. *Wood*, *supra*, 426 U.S. at 347.[2]

Even though Ewing has a property interest in continued enrollment, the Solicitor General argues (United States Br. at 9-12), and petitioner Regents suggests (Pet. Br. at 33-37), that Ewing's property interest is entitled only to the procedural protections of due process. The Solicitor General contends that, because respondent's

[2] The Solicitor General concedes that the existence of a property interest may not have been "expressly challenged by petitioner" (United States Br. at 9), but nevertheless questions whether Ewing possesses a property interest in continued enrollment (*id.* at 12-16). The Solicitor General wholly ignores the basis of the Sixth Circuit's holding of a property interest: the Michigan Supreme Court's recognition of a legally enforceable implied contract between a student and a university. It is that relationship, recognized under state law as "an implied understanding that [a student] shall not be arbitrarily dismissed," *Booker* v. *Grand Rapids Medical College*, *supra*, 156 Mich. at 100, that the Sixth Circuit found to create the property interest at stake here, and *not*—as the Solicitor General asserts—an improper "merge[r]" of "protected interest analysis" with "arbitrary and capricious analysis." (See United States Br. at 13 n.11)

property interest does not flow from the Bill of Rights, the Due Process Clause does not protect that interest from arbitrary and capricious deprivation. We submit this brief to refute the Solicitor General's constitutional analysis.

As we show, this Court's decisions establish that the Due Process Clause, at bottom, protects individuals against arbitrary governmental action that deprives them of life, liberty or property. Due process is not satisfied merely by providing notice and a hearing if the government only goes through the motions and then renders a decision that is irrational or without factual support. Thus, in the case presented here, the fact that Ewing was afforded constitutionally adequate procedures does not immunize the Regents' action from review under the Due Process Clause to determine whether that action was arbitrary and capricious.

Nor does the fact that state law may provide a similar or parallel remedy for the infringement of interests protected by the Due Process Clause preclude the application of such substantive analysis. The Due Process Clause, as implemented through section 1983, provides an independent federal basis for challenging deprivations of constitutionally protected property interests. The Court of Appeals was therefore correct in holding that the substantive aspects of the Due Process Clause prohibit petitioner Regents from depriving Ewing of his property interest in continued enrollment on the ground that he had failed the NBME Part I examination if, as that court concluded, the Regents' action was "arbitrary and capricious." Pet. App. 31a.

ARGUMENT

THE DUE PROCESS CLAUSE AFFORDS SUBSTANTIVE PROTECTION AGAINST THE DEPRIVATION OF AN INDIVIDUAL'S PROPERTY INTERESTS BY ARBITRARY AND CAPRICIOUS GOVERNMENTAL ACTION.

The decisions of this Court have repeatedly recognized the central importance of the Due Process Clause in protecting individuals from the wrongful deprivation of their fundamental interests in life, liberty, and property. As the Court reiterated only last Term, "[t]he touchstone of Due Process is freedom from arbitrary governmental action." *Ponte* v. *Real*, —— U.S. ——, 105 S. Ct. 2192, 2195 (1985). Accord, *e.g.*, *Slochower* v. *Board of Education*, 350 U.S. 551, 559 (1956). And, in applying the Due Process Clause to interests in "property," the Court has explained: "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). The Due Process Clause thus stands guard against arbitrary actions which undermine the "legitimate claim[s] of entitlement" that form the basis for constitutional property interests. *Ibid.*

In applying these principles, the Court has not limited its review of governmental actions that deprive individuals of property interests only to the procedures that accompany those actions. For example, in *Harrah Independent School District* v. *Martin*, 440 U.S. 194 (1979), the Court concluded that a tenured teacher, who possessed a property interest in continued employment, had been "accorded the usual elements of procedural due process" in her dismissal from employment. *Id.* at 197. The fact that the school district had provided procedural due process, however, did not end the Court's due process inquiry. Instead, the Court turned to "the 'substantive

aspects' of 'life, liberty, and property' " in its evaluation of the teacher's claim. *Id.* at 198. After reviewing the relevant facts, the Court ruled that the basis for the school district's decision to dismiss the teacher was not "arbitrary," but the Court did not doubt that the teacher's "claim of a denial of substantive due process" was properly presented and warranted the Court's scrutiny. *Id.* at 199.

Similarly, in *Barsky* v. *Board of Regents*, 347 U.S. 442 (1954), the Court reviewed New York's disciplinary action against a licensed physician as a claimed deprivation of "property without due process of law." *Id.* at 454. The Court did not question the sufficiency of the state's statutory procedures, but addressed instead the question whether "the Board of Regents or the recommending committees [had] made an arbitrary and capricious decision or [had] relied upon irrelevant evidence." *Id.* at 455; accord, *id.* at 456 ("we see no reason to conclude that the board . . . acted arbitrarily, capriciously or through prejudice and deprived appellant of due process of law"). And, in *Wieman* v. *Updegraff*, 344 U.S. 183 (1952), the Court held invalid on substantive due process grounds a loyalty oath that barred individuals from state employment based on their organizational memberships, regardless of the individuals' knowledge of the organizations' purposes: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. . . . [C]onstitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *Id.* at 191-92.

The Court has followed a similar approach under the "liberty" prong of the Due Process Clause. Thus, the Court has ruled that the Due Process Clause "affords not only a procedural guarantee against the deprivation of 'liberty,' but likewise protects *substantive aspects* of liberty against unconstitutional restrictions by the State." *Kelley* v. *Johnson*, 425 U.S. 238, 244 (1976) (emphasis

added). And the Court has recently held that the deprivation of a prisoner's liberty interest in "good time credits" requires not only that constitutionally adequate procedures be followed, see *Wolff* v. *McDonnell*, 418 U.S. 539, 563-67 (1974), but also that a revocation of good time credits be supported substantively by "some evidentiary basis for [the] decision" and "have some basis in fact." *Superintendent, Massachusetts Correctional Institution* v. *Hill*, —— U.S. ——, 105 S. Ct. 2768, 2774 (1985). See also *Thompson* v. *Louisville*, 362 U.S. 199 (1960).

In short, the Court's decisions teach that, where a property or liberty interest is involved, the Due Process Clause not only requires "some kind of a hearing," *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 569-70 & n.7, but also requires that the state's decision to deprive an individual of that property or liberty interest be nonarbitrary—*i.e.*, that the state's factual determinations be based upon evidence adduced at the hearing, and that the state's ultimate decision rest on rational considerations. Absent these "substantive" requirements, the procedures mandated by Due Process could easily become meaningless gestures, and the Clause would fail of its central pupose: to guard against governmental arbitrariness.[3]

Ignoring this precedent, the Solicitor General argues that the Due Process Clause provides no basis to review the question whether the Regents' deprivation of Ewing's property interest is arbitrary and capricious. The Solicitor General makes two related contentions. First, the Solicitor General contends that the Due Process Clause

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[3] It is arguable that the requirement that a state engage in rational decisionmaking before it may deprive an individual of liberty or property is actually an aspect of *procedural* due process. *Cf. Jackson* v. *Virginia*, 443 U.S. 307, 314 (1979). Nonetheless, because the parties and the courts below have treated this as a substantive issue, we do likewise.

provides only procedural protections for property interests which are grounded in state law, and that the substantive aspects of due process apply only to interests which are bottomed on the Bill of Rights and encompassed within the term "liberty." (United States Br. at 9-10) Second, the Solicitor General contends that because state law presumably provides a remedy for breach of contract, the Due Process Clause should not afford a federal remedy for arbitrary and capricious deprivation of a property interest that is grounded in an implicit contract. As we now show, neither contention has merit.

1. Plainly, the language of the Due Process Clause admits of no distinction between the protections afforded to "liberty" and those afforded to "property." The Due Process Clause provides "not only a *procedural* guarantee against [a] deprivation . . ., but likewise protects *substantive* aspects" of the interest, *Kelley* v. *Johnson*, *supra* 425 U.S. at 244 (emphasis added), and that is as true for property interests as it is for liberty interests.[4] The Solicitor General's suggestion to the contrary—that substantive protection applies only to liberty interests derived from the Bill of Rights and not to property interests rooted in state law—is made from whole cloth. Notably, the Solicitor General relies on no decision of this Court in support of his radical proposition. Instead, the Solicitor General cites to a single decision by the United States Court of Appeals for the Seventh Circuit, *Brown* v. *Brienen*, 722 F.2d 360 (1983)—a decision which, like

[4] This is not to say that the constitutional question posed by an alleged deprivation of a right secured by the Bill of Rights is identical to the question posed by the deprivation of a property or liberty interest granted to an individual by state law. Where freedom of speech or religion or one of the other freedoms secured by the Bill of Rights is concerned, the Constitution obviously demands more than that the state act non-arbitrarily. But as we show in text, even where "only" a state-created property or liberty interest is at issue, the Constitution demands more than that the state follow the correct procedures before depriving an individual of such an interest.

the Solicitor General's brief, neither cites nor discusses this Court's decisions concerning the substantive aspects of the Due Process Clause.

Moreover, as this Court's precedents establish, the Solicitor General's contention is simply wrong. This Court has reviewed on substantive grounds the deprivation of "liberty" interests that derived *not* from the Bill of Rights but from the terms of state law.[5] And this Court has repeatedly applied the substantive aspects of due process to property interests grounded in state law to judge whether the deprivations of those interests were arbitrary and capricious. See *supra* pages 5-7.

When considered in light of the grand purposes of the Due Process Clause, this result comes as no surprise. "The touchstone of Due Process is freedom from arbitrary governmental action," *Ponte* v. *Real*, *supra*, 105 S. Ct. at 2195—whether that arbitrary action deprives an individual of life, of liberty, or of property. Constitutionally adequate procedures, of course, are an important means to that end, *e.g.*, *Goss* v. *Lopez*, 419 U.S. 565, 583-84 (1975); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring), but in and of themselves proper procedures cannot guarantee freedom from arbitrary deprivations of protected interests. If, for example, petitioner Regents determined to dismiss students because they were left-handed or because they had blond hair,

[5] In *Superintendent, Massachusetts Correctional Institution* v. *Hill*, for example, the liberty interest at stake was a prisoner's statutory right to good time credits that might reduce the term of imprisonment. 105 S. Ct. at 2770-71. That interest, while grounded in an interest in freedom from bodily restraint, existed as a cognizable "liberty" interest only because Massachusetts law had limited the discretion of prison officials to shorten or lengthen a lawful prison sentence, and not as a result of any part of the Bill of Rights. *E.g.*, *Jago* v. *Van Curen*, *supra*, 454 U.S. at 21; *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 466-67 (1981).

such action would be the epitome of governmental arbitrariness. No amount of procedures, designed to ascertain whether in fact a student was left-handed or had blond hair, could make the Regents' action rational and non-arbitrary. In these circumstances, the "substantive aspects" of the Due Process Clause would apply, and the governmental action would properly be ruled invalid no matter how extensive the procedural protections that had been made available.

2. The Solicitor General points to nothing in the language or the purpose of the Due Process Clause that would justify overturning this Court's due process precedents. Instead, the Solicitor General suggests only that where state law provides a remedy for violation of contract rights, "[i]t makes little sense" to provide as well the opportunity for federal review of whether the corresponding deprivation of a property interest is arbitrary and capricious. (United States Br. at 11). The Solicitor General's policy argument comes too late. The Framers of the Fourteenth Amendment determined that the federal Constitution should protect against deprivations of property that are without due process, without regard to the remedies that are available under state law to redress the deprivation. Similarly, the Congress that enacted section 1983 decided that individuals should have free access to the federal courts to remedy such deprivations, again without regard to the availability of state-law remedies. *Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 506-07 (1982); *Monroe v. Pape*, 365 U.S. 167, 183 (1961). In short, the reason for the availability of federal review of due process claims is simple: "A federal remedy is provided because the interest asserted by the plaintiff is important enough to be protected by the federal Constitution." Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5, 22 (1980).[6]

[6] The Solicitor General's implicit suggestion that no constitutional violation exists if state law provides an action for contract damages

Moreover, the implicit assumption underlying the Solicitor General's contention—that state contract law and federal due process law provide duplicate remedies for identical wrongs—is incorrect. The existence of a concurrent state-law remedy for unlawful governmental action that is also an arbitrary deprivation of a property interest does not necessarily render the state-law claim and a section 1983 action coterminous. Ordinarily, state courts adjudicating a state-law property or contract claim will not care in the slightest about the reasons for the governmental action; the state-law issue will be whether the state or municipality was privileged to act as it did. In contrast, the issue presented under the substantive aspects of the Due Process Clause is whether the governmental action is arbitrary and capricious. The federal claim turns entirely on the reasons, or the lack of reasons, why the state or municipality took the challenged action.[7]

is preposterous. When a property interest exists, state law regularly provides a remedy of some form for the deprivation of that interest. Property interests are defined, after all, as "legitimate claim[s] of entitlement" "stem[ming] from an independent source such as state law." *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 577. But the existence of a state-law remedy does not replace or eliminate the protections of the Due Process Clause. An arbitrary deprivation of a property interest becomes no less offensive to the Constitution merely because it is also a violation of state law.

[7] In this case, respondent Ewing's property interest presents the unusual situation in which the contract breach and the substantive due process violation are identical. By its nature, Ewing's state-law interest does not protect against *all* dismissals from the University, but yields only a legitimate expectation that he will not be dismissed "arbitrarily." *Booker* v. *Grand Rapids Medical College*, *supra*, 156 Mich. at 100; Pet. App. 31a. Thus, by the purest coincidence that state law mirrors the Constitution in this case, Ewing has a valid contract claim only if he also has a valid substantive due process claim. This does not mean, as the Solicitor General suggests (United States Br. at 11), that substantive due process has "constitutionalized" Michigan contract law; rather, Ewing's contract rights under Michigan law are so limited as to be coter-

Thus, a state may provide some substantive grounds for challenging the deprivation of property or contract rights, yet not the ground which triggers due process protection—*viz.*, that the governmental action was arbitrary and capricious within the meaning of the federal Constitution.[8] Conversely, there will be instances in which state law provides a remedy for the loss of state-law interests, yet no federal remedy is available because the deprivation of the corresponding property interest was not arbitrary.[9]

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minous with his federal constitutional right not to be deprived of property arbitrarily.

[8] In addition, as Justice Harlan recognized in *Monroe* v. *Pape*, the relief available under state law may be inadequate to remedy violations of the Constitution:

> There will be many cases in which the relief provided by the state to the victim of a use of state power which the state either did not or could not constitutionally authorize will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right . . . . It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.

365 U.S. at 196 n.5 (Harlan, J., concurring). See, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) (action for negligence of a state official insufficient remedy for loss of property interest in state-law cause of action for discrimination); *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978) (post-termination suit for damages or post-payment action for refund inadequate remedies for loss of property interest in continued utility service).

[9] An "explicit contractual provision" entered into between an individual and a municipality, for example, creates a "legitimate claim of entitlement" under state law, and hence a constitutional property interest. *Perry* v. *Sindermann*, *supra*, 408 U.S. at 601. The municipality's breach of that provision will commonly give rise to a right under state law to recover contract damages, without regard to the reasons, or lack of reasons, for the breach. *E.g.*, *Restatement (Second) of Contracts* § 235(2) & comment b (1979). But the existence of a rational reason for the breach (*e.g.*, that the municipality no longer required the goods or services called for in the contract) would preclude municipal liability under section 1983. Only if the municipality's breach were arbitrary and capricious—presumably a rare occurrence—would there also be a deprivation of property without substantive due process.

In sum, the existence of state-law claims and remedies—which may or may not mirror those available under the Due Process Clause—neither displaces nor precludes the independent federal basis for challenging deprivations of constitutionally protected property interests as being arbitrary and capricious. The Court of Appeals was therefore warranted in evaluating Ewing's dismissal from Medical School, and the consequent deprivation of his property interest in continued enrollment, under the "arbitrary and capricious" standards of substantive due process.

CONCLUSION

For the foregoing reasons, the constitutional analysis proposed by the Solicitor General should be rejected. On the basis of the analysis set forth in the decision of the Court of Appeals, the judgment below should be affirmed.

Respectfully submitted,

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